

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

NATHEN BARTON,

Plaintiff,

v.

WALMART INC., JOHN DOE 1-10,

Defendants.

CASE NO. 23-5063 DGE-RJB

ORDER ON CROSS MOTIONS
FOR SUMMARY JUDGMENT
AND MOTIONS TO STRIKE

This matter comes before the Court on the Plaintiff's Motion for Summary Judgment on Plaintiff's Claims (Dkt. 72), Defendant Walmart Inc.'s ("Walmart") Motion for Summary Judgment (Dkt. 75), Walmart's motions to strike (Dkts. 82 and 87), and Plaintiff's motions to strike (Dkts. 77, 84 and 89). The Court has considered the pleadings filed regarding the motions and remaining file and is fully advised. Oral argument has been requested but is unnecessary to decide the motions.

The Plaintiff, *pro se*, brings this case alleging violations of the Telephone Consumer Protection Act, 47 U.S.C. § 227, *et. seq.*, ("TCPA") and Washington's Consumer Electronic

1 Mail Act, RCW 19.190, *et. seq.*, (“CEMA”) in connection with text messages made to a mobile
2 phone number (***)***-1019. Dkt. 12. He seeks damages, including treble damages, and
3 injunctive relief. *Id.* This is one of dozens of TCPA cases the Plaintiff has filed with varying
4 success. *See e.g. Barton v. LeadPoint Inc., et al.*, No. 3:21-cv-05372-BHS (W.D. Wash.);
5 *Barton v. DirecTV LLC*, No. 3:21-cv-05423-BHS (W.D. Wash.); *Barton v. Asset Realty LLC*, et
6 al., No. 3:21-cv-05462-RJB (W.D. Wash.); *Barton v. The Rian Group Inc., et al.*, No. 3:21-cv-
7 05485-BHS (W.D. Wash.); *Barton v. JMS Associate Marketing LLC*, et al., No. 3:21-cv-05509-
8 RJB (W.D. Wash.); *Barton v. Delfgauw, et al.*, No. 3:21-cv-05610-JRC (W.D. Wash.); *Barton v.*
9 *LendingPoint LLC, et al.*, No. 3:21-cv-05635-BHS (W.D. Wash.); *Barton v. American*
10 *Protection Plans LLC*, No. 3:21-cv-05669-BHS (W.D. Wash.); *Barton v. SelectQuote Insurance*
11 *Services*, No. 3:21-cv-05817-BHS (W.D. Wash.); *Barton v. America’s Lift Chairs LLC et al.*,
12 No. 3:21-cv-05850-BHS (W.D. Wash.); *Barton v. Sopi Financial LLC*, et al., No. 3:21-cv-
13 05934-RJB (W.D. Wash.); *Barton v. Allstate Insurance Company*, et. al., No. 3:22-cv-5260-JRC;
14 and *Barton v. Litigation Practice Group PC, et al.*, 3:22-cv-05483-TLF. He has also filed cases
15 in other U.S. District Courts (*See e.g. Barton c. Associated Credit and Collection Bureau Inc.*,
16 No. 3:05-cv-00251 (N.D. Texas)).

17 In any event, in this case, both parties move to strike portions of various pleadings (Dkts.
18 77, 82, 84, 87 and 89) and move for summary judgment (Dkts. 72 and 75). The Plaintiff’s
19 motions to strike should be denied (Dkt. 77) and stricken as moot (Dkts. 84 and 89). Walmart’s
20 motions to strike should be granted, in part, and stricken as moot, in part, (Dkt. 82) and stricken
21 as moot (Dkt. 87). Further, because the undisputed facts show that Walmart did not send the
22 Plaintiff “**telephone solicitation**” or “**commercial text messages**,” but messages regarding
23 orders placed by another customer, Walmart’s motion for summary judgment (Dkt. 75) should
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1 be granted, the Plaintiff's motion for summary judgment (Dkt. 72) denied, and the case
2 dismissed.

3 **I. FACTS AND PROCEDURAL HISTORY**

4 According to Walmart, it gives customers who order online or through its mobile phone
5 application ("app") the option to receive real-time text message updates about pending orders.
6 Dkt. 76-1 at 2. In addition to when they open their accounts, customers are given an additional
7 opportunity to opt to receive text messages about each individual order when they place the
8 order. *Id.* During the checkout process, on the "Review Order" page, the customer is presented
9 with a checked box and the language "I want to receive text updates about the status of my
10 order." *Id.* The customer can uncheck the box. *Id.* Near the checked box is a space that
11 includes the phone number that is associated with the customer's account or address; these are
12 provided by the customer when an account is opened or when a customer updates their contact
13 information. *Id.* at 2-3. If a customer indicates that they want text message updates sent
14 regarding their orders, Walmart typically sends five categories of messages when they apply: (1)
15 order is ready for pickup, (2) order is shipped, delayed, out for delivery, or delivered, (3) some
16 ordered items are unavailable, (4) substitutions for ordered items are possible for unavailable
17 items, and (5) order has been canceled. Dkt. 76-1 at 3-5. These text updates are connected to
18 specific orders. *Id.* at 3.

19 In 2012, I.M. acquired a mobile phone which was assigned the number ending in 1019, the
20 phone number that is the subject of this lawsuit. Dkt. 76-2 at 6. (I.M. is not a party to this
21 lawsuit and the parties have agreed to use her initials to protect her privacy. Dkts. 72 and 76.)
22 Around 2018 when she still had the phone number ending 1019, I.M. opened an online account
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1 with Walmart to order groceries. Dkt. 76-2 at 6-7 and 16. When she opened the online account,
2 she checked the box that she wanted text messages sent to her phone about her orders. *Id.* at 14.

3 I.M. uses the Walmart app on her mobile phone to place orders with Walmart and then she or
4 her husband pick the orders up or the orders are delivered to her home. Dkts. 76-2 at 7; 12 at 18.
5 I.M. acknowledges that when she places her orders on her app, a portion of the order process
6 includes a check box that appears that says, “I want to receive text updates about my order.” *Id.*
7 at 13. She states she doesn’t pay attention to the number listed by the checked box. *Id.* I.M.
8 acknowledges that she “never really paid attention” to the part of the order form asking about
9 whether she wanted text messages about her order because Walmart always sent her an email
10 about the order as well. *Id.* at 14.

11 I.M. states that she likes receiving updates from Walmart about her orders while they are in
12 process – for example, if an item is unavailable, or if the order is ready early. Dkt. 76-2 at 20.
13 She also finds it helpful when Walmart notifies her of possible substitutions to consider when an
14 item is unavailable. *Id.* Customers can designate in their account, or at the time of purchase,
15 whether they want Walmart to automatically substitute items (when an ordered like item is
16 unavailable). Dkt. 83-1 at 2.

17 I.M. kept that phone number ending in 1019 until January of 2020. Dkt. 76-2 at 6. Her ex-
18 husband canceled the phone line, at which time she “lost access to [the phone number].” Dkt. 76-
19 2 at 6 and 76-8 at 9. In July of 2020, when the Plaintiff bought an additional mobile phone (he
20 owns several phones), the phone company reassigned the number ending in 1019 to the Plaintiff.
21 Dkt. 83-4 at 6. Plaintiff registered the number at issue here on the national do-not-call list on
22 February 16, 2021. Dkt. 73 at 2. I.M. did not immediately change her phone number in her
23 Walmart account, so as she directed in her account settings, text messages about her orders
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1 continued to go to the number ending in 1019, even after the number was reassigned to Plaintiff
2 by the phone company. Dkt. 76-2 at 13.

3 The Plaintiff contends that from September 3, 2022 through February 2, 2023, Walmart sent
4 approximately 90 text messages to the number ending in 1019 regarding I.M.'s orders. Dkts. 12
5 and 72 at 26 n.73 (This lawsuit doesn't include texts past February 2, 2023). It is unclear when
6 I.M. changed the number listed in her Walmart account so that the Plaintiff would no longer
7 receive text messages about her order. I.M. states that now that she has updated the phone
8 number, she receives text messages about her orders. Dkt. 76-2 at 13.

9 The content of the text messages at issue are uncontested and are drawn from the Amended
10 Complaint (Dkt. 12). Those text messages - some of which were sent multiple times - provided:

- 11 • A September 3, 2022 message that read: "Walmart: Part of your order is ready for
12 curbside pickup until Sat, Sep 03. Check in before you go: <https://w-mt.co/g/3908R1>
13 Reply HELP for info; STOP to opt out." Dkt. 12 at 19.
- 14 • A September 3, 2022 message that read: "As requested, we've canceled your Walmart or-
15 der. View updated order details: <https://w-mt.co/g/391Zfv> Reply HELP for info; STOP to
16 opt out." Dkt. 12 at 19.
- 17 • An October 22, 2022 message that read: "Sorry, some items in your Walmart order
18 weren't available. Review your order: <https://w-mt.co/g/4GXMnv> Reply HELP for help;
19 STOP to opt out." Dkt. 12 at 9.
- 20 • An October 29, 2022 message that read: "Your Walmart order has substitutions.
21 Anything you don't want? Please let us know soon: <https://w-mt.co/g/4KyLN4> Reply
22 HELP for info; STOP to opt out." Dkt. 12 at 9.

- 1 • A November 16, 2022 message that read: “Some items may be low in stock. Pick
2 substitution preferences for your upcoming Walmart order: <https://w-mt.co/g/4NidiA>.”
3 Dkt. 12 at 11.
- 4 • A December 21, 2022 message that read: “Your Walmart order was delivered. Thanks for
5 shopping with us! Reply HELP for info; STOP to opt out.” Dkt. 12 at 21.
- 6 • A December 24, 2022 message that read: “Great news, [I.M.], Your Walmart package is
7 out for delivery and should arrive today. Track: <https://w-mt.co/g/5rcVub> Reply HELP
8 for info; STOP to opt out.” Dkt. 12 at 18.
- 9 • A December 27, 2022 message that read: “We’re sorry, some items in your Walmart
10 order were out of stock, so we had to cancel. View details: <https://w-mt.co/g/5sGEcP>
11 Reply HELP for info; STOP to opt out.” Dkt. 12 at 19.
- 12 • A January 28, 2023 message that read: “Your Walmart curbside pickup is ready. Check
13 in before you leave, so we know you’re on the way: <https://w-mt.co/g/5zHyUX> Reply
14 HELP for info; STOP to stop.” Dkt. 12 at 24.

15 Aside from Walmart’s response when the Plaintiff texted “STOP,” which is addressed in the
16 following paragraph, the Plaintiff fails to point to any other language in the text messages from
17 Walmart on which he is basing his claims.

18 According to Walmart, customers have the option to stop receiving text message updates
19 about an order anytime by replying “STOP” to the message. Dkt. 76-1 at 8. If the customer
20 replies “STOP,” Walmart sends a message that indicates that they will “no longer receive
21 m[essages] about [their] **order**.” *Id.* at 3 (*emphasis added*). No further text messages are sent
22 for any future order unless the customer indicates that they want text message updates about that
23 order at the time of purchase. *Id.* The Plaintiff states that on three occasions (Sept. 15, 2022;
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1 October 19, 2022; and November 26, 2022), he texted “STOP” in response to the text messages
2 Walmart was sending I.M. related to her orders. Dkt. 76-3 at 168. I.M. continued to order from
3 Walmart, generally leaving the box checked that indicated she wanted order update text
4 messages sent to the phone number ending in 1019. Dkt. 76-2 at 8-13.

5 Although he knew who I.M. was and had her contact information because of other TCPA
6 cases¹ he filed involving the number ending in 1019, the Plaintiff did not inform I.M. that he was
7 getting text messages that were meant for her from Walmart about her orders. Dkt. 76-3 at 170.
8 He also did not block the two short codes Walmart used to send the messages. *Id.* at 261-263.
9 The Plaintiff did not call Walmart to get it to stop until December of 2023 - well after this
10 litigation began. Dkt. 73-12 at 3. Instead, on January 2, 2023, the Plaintiff filed this case in
11 Clark County Washington Superior Court, serving Walmart with a copy of the complaint on
12 January 4, 2023. Dkt. 1. The case was removed to this Court on January 24, 2023. *Id.* The
13 Plaintiff contends that Walmart sent 15 additional texts after receipt of the complaint. Dkt. 72.

14 The parties now file cross motions for summary judgment and several motions to strike. The
15 motions to strike should be considered first and then the motions for summary judgment.

16 II. DISCUSSION

17 A. MOTIONS TO STRIKE

18 1. Walmart’s Motions to Strike

19 In its response to the Plaintiff’s motion for summary judgment, Walmart moves to strike
20 references in Plaintiff’s motion for summary judgment (Dkt. 72 at 9-10), Plaintiff’s declaration
21 (Dkt. 73 at 5-6), and screenshots of emails from Walmart (Dkts. 73-4 and 73-5) related to two
22 phone calls the Plaintiff personally made to Walmart’s 1-800 number. Dkt. 82. The Plaintiff
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24 ¹ According to the Plaintiff, since early 2021, he has filed around 40 TCPA lawsuits. Dkt. 76-3 at 233.

1 purportedly recorded the calls and posted the calls on YouTube sometime in December 2023.
2 Dkt. 73 at 5-6. Walmart also asks the Court to strike references in Plaintiff's motion for
3 summary judgment (Dkt. 72 at 10-17) and Plaintiff's declaration (Dkt. 73 at 4) wherein the
4 Plaintiff discusses YouTube videos the Plaintiff allegedly made in December of 2022. Dkt. 82.
5 Walmart also asks the Court to strike exhibits attached to the Plaintiff's motion for summary
6 judgment that appear to be FaceBook screenshots of children (Dkts. 73-13 - 74-15) and an
7 Amazon order for a watch (Dkt. 73-18). *Id.*

8 Walmart's motion to strike the references to the YouTube recordings (Dkt. 82) should be
9 granted. The actual content of the conversations is not in the record. Evidence outside the
10 record is not considered on summary judgment. Fed. R. Civ. P. 56 ("a party asserting that a fact
11 . . . is genuinely disputed must support that assertion by . . . citing to particular parts of the
12 **record**"). The Court is not obligated to go to YouTube to add to the record. Even if it were,
13 these recordings appear to be irrelevant to the key issue in the pending motions. They do not
14 relate to whether the text messages were "telephone solicitations" or "commercial text messages"
15 under the TCPA or CEMA, respectively.

16 Walmart's motion to strike the screenshots of children on FaceBook and the Amazon
17 order (Dkt. 82) should be stricken as moot. While the evidence is of questionable relevance, it
18 was proffered in connection with issues unrelated to the critical question in deciding the
19 summary judgment motions.

20 In its Surreply, Walmart moves to strike portions of the Plaintiff's reply to Walmart's
21 response to Plaintiff's motion for summary judgment (Dkt. 84) and portions of the Plaintiff's
22 declaration offered in support of his reply (Dkt. 85) related to whether the number ending in
23 1019 is "residential." Dkt. 87. Walmart also moves to strike portions of the Plaintiff's reply to
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1 Walmart's response to Plaintiff's motion for summary judgment (Dkt. 84) related to whether the
2 Plaintiff has standing. *Id.*

3 Walmart's motion (Dkt. 87) should be stricken as moot. The Court need not reach the
4 issue of whether the phone number is "residential" to decide the motions for summary judgment.
5 Further, Walmart did not raise standing issues and the Court need not reach the question because
6 the motions for summary judgment can be decided on other grounds. The Court need not reach
7 Walmart's additional arguments regarding whether Plaintiff's reply to Walmart's response to
8 Plaintiff's motion for summary judgment (Dkt. 84) was over the word limit, whether his reply
9 (Dkt. 84) contained new evidence, and whether Walmart's surreply (Dkt. 87) was timely.

10 2. Plaintiff's Motions to Strike

11 In his response to Walmart's motion for summary judgment, the Plaintiff moves to strike
12 portions of Walmart's motion "implying [he] had a duty to mitigate damages," implying that
13 I.M. could consent to the text messages, that I.M. found text messages about her orders helpful,
14 and portions of the Plaintiff's wife's deposition on what she considered telemarketing. Dkt. 77.

15 Plaintiff's motion to strike (Dkt. 77) should be denied. The Plaintiff provides no legal basis
16 to support his motion. Moreover, these facts are largely background facts and provide context
17 for what happened. They help explain why Walmart continued to send order updates after the
18 Plaintiff texted "STOP" in response to three orders. In any event, these facts are of marginal
19 help in deciding the key question in the motions for summary judgment – whether the text
20 messages meet the TCPA and CEMA's statutory definitions of prohibited texts.

21 In his reply to Walmart's response to the Plaintiff's motion for summary judgment, the
22 Plaintiff moves to strike his ex-wife's declaration (Dkt. 83-2), which was offered related to
23 whether the number ending in 1019 was truly a "residential" number as required under the
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1 relevant statutes, an alleged transcript of the Plaintiff being interviewed by National Public Radio
2 about his TCPA litigation (Dkt. 83-3), a list alleged to be of the number of times the Plaintiff and
3 his wife visited Walmart (Dkt. 83-12), and several Walmart receipts alleged to be from
4 Plaintiff's credit card (Dkt. 83-13) and portions of Walmart's response to the Plaintiff's motion
5 for summary judgment that referred to those materials (Dkt. 82). Dkt. 84.

6 The Plaintiff's motion to strike (Dkt. 84) should be stricken as moot. This evidence was
7 offered to point to disputed facts on a separate element of Plaintiff's claims – whether the phone
8 number was “residential” - and on whether Walmart had a viable affirmative defense of
9 “established business relationship.” The Court need not reach the issue of whether the phone
10 number was “residential” or if Walmart made a sufficient showing on its affirmative defense
11 because the motions for summary judgment can be decided based on different issues.

12 In response to Walmart's motion to strike, which was in Walmart's Surreply (Dkt. 87), the
13 Plaintiff filed “Plaintiff's Motion to Strike Portions of Dkt. 87.” Dkt. 89. As stated above in
14 Section II.A.1., Walmart's motion to strike (Dkt. 87) should be denied as moot. Accordingly,
15 Plaintiff's motion to strike Walmart's Surreply (Dkt. 89) should be denied as moot.

16 **B. SUMMARY JUDGMENT STANDARD**

17 Summary judgment is proper only if the pleadings, the discovery and disclosure materials
18 on file, and any affidavits show that there is no genuine issue as to any material fact and that the
19 movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). The moving party is
20 entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient
21 showing on an essential element of a claim in the case on which the nonmoving party has the
22 burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). There is no genuine issue
23 of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find
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1 for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586
2 (1986) (nonmoving party must present specific, significant probative evidence, not simply “some
3 metaphysical doubt.”). Conversely, a genuine dispute over a material fact exists if there is
4 sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve
5 the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253 (1986);
6 *T.W. Elec. Serv. Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

7 The determination of the existence of a material fact is often a close question. The court
8 must consider the substantive evidentiary burden that the nonmoving party must meet at trial,
9 which is a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W.*
10 *Elect.* at 630. The court must resolve any factual issues of controversy in favor of the
11 nonmoving party only when the facts specifically attested by that party contradict facts
12 specifically attested by the moving party. The nonmoving party may not merely state that it will
13 discredit the moving party’s evidence at trial, in the hopes that evidence can be developed at trial
14 to support the claim. *T.W. Elect.* at 630. Conclusory, non-specific statements in affidavits are
15 not sufficient, and “missing facts” will not be “presumed.” *Lujan v. Nat’l Wildlife Fed.*, 497
16 U.S. 871, 888–89 (1990).

17 C. FEDERAL LAW CLAIM: TCPA CLAIM

18 The Plaintiff asserts a TCPA claim under 47 U.S.C. § 227(c) and its implementing
19 regulation, 47 C.F.R. § 64.1200. Dkt. 12. Walmart argues that the Plaintiff’s TCPA claim
20 should be dismissed because the text messages at issue were not “telephone solicitations,” as
21 required under the TCPA, but were updates to orders.

22 Section 227(c) of the TCPA directs the Federal Communication Commission to “promulgate
23 regulations under which ‘residential subscribers’ may request that their telephone numbers be
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1 included in a national do-not-call registry and database, and to prohibit telephone solicitation to
 2 ‘any subscriber included in such database.’” *Chennette v. Porch.com, Inc.*, 50 F.4th 1217, 1223
 3 (9th Cir. 2022)(*quoting* 47 U.S.C. § 227(c)(3)(F)). Pursuant to § 227(c) of the TCPA’s
 4 implementing regulation, 47 C.F.R. § 64.1200(c)(2), “[n]o person or entity shall initiate any
 5 telephone solicitation to . . . [a] residential telephone subscriber who has registered his or her
 6 telephone number on the national do-not-call registry”

7 Both the TCPA § 227 and its implementing regulation 47 C.F.R. § 64.1200, define
 8 “telephone solicitation” as “the initiation of a telephone call or message for the purpose of
 9 encouraging the purchase . . . of . . . goods, or services, which is transmitted to any person”
 10 47 U.S.C. § 227(a)(4); 47 C.F.R. § 64.1200(f)(15). To determine whether the **purpose** of the
 11 text messages at issue here were to “encourag[e] the purchase . . . of . . . goods, or services,” and
 12 thus were “telephone solicitations” under § 227(c) and its regulations, courts in the Ninth Circuit
 13 consider the content and context of the communications “with a measure of common sense.” *See*
 14 *Chesbro v. Best Buy Stores, L.P.*, 705 F.3d 913, 918 (9th Cir. 2012); *An Phan v. Agoda Co. Pte.*
 15 *Ltd.*, 351 F. Supp. 3d 1257 (N.D. Cal 2018), *aff’d* 798 Fed. App’x 157 (9th Cir. 2020).

16 1. **Content of Messages Demonstrates Texts Were Not Solicitations**

17 Applying that “measure of common sense” here, the Plaintiff fails to point to issues of fact
 18 that the content of any of the text messages was to “encourag[e] the purchase . . . of . . . goods or
 19 services.” Walmart convincingly argues that the text messages were sent to facilitate fulfillment
 20 of its customer’s previously placed orders and were informative only.

21 For example, Walmart sent messages that orders were ready for pick up: “. . . Walmart: Part
 22 of your order is ready for curbside pickup until Sat, Sep 03. . . .” Dkt. 12 at 19. Walmart sent
 23 text messages regarding I.M.’s orders’ delivery status: “Great news, [I.M.]! Your Walmart
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1 package is out for delivery and should arrive today. . .” *Id.* at 18. As requested by I.M., Walmart
2 sent text message updates that some items she ordered were unavailable: “Sorry, some items in
3 your Walmart order weren’t available. Review your order: <https://w-mt.co/g/4GXMnv> . . .” *Id.* at
4 9.

5 When items she ordered were unavailable or low in stock, Walmart offered her the
6 opportunity to approve or decline substitutions or change her account’s substitution preferences:
7 “[y]our Walmart order has substitutions. Anything you don’t want? Please let us know soon:
8 <https://w-mt.co/g/4KyLN4> . . .” and “[s]ome items may be low in stock. Pick substitution
9 preferences for your upcoming Walmart order: <https://w-mt.co/g/4NidiA> . . .” Dkt. 12 at 9, 11.
10 (According to Walmart, the website links were to I.M.’s account; the Plaintiff did not have I.M.’s
11 permission to access the account, so the link took him to the general Walmart webpage. Dkt. 83-
12 1 at 3.) The Plaintiff argues that inclusion of this link makes the text message a commercial one.
13 Dkt. 72. Contrary to the Plaintiff’s assertions, a link to a company’s website, without more, does
14 not render a text message from that company a “telephone solicitation.” *An Phan v. Agoda Co.*
15 *Pte. Ltd.*, 351 F. Supp. 3d 1257 (N.D. Cal 2018), *aff’d* 798 Fed. App’x 157 (9th Cir. 2020);
16 *Vallianos v. Schultz*, 2019 WL 4980649 at *3 (W.D. Wash. Oct. 8, 2019)(“the mere inclusion of
17 a link to a website on which a consumer can purchase a product does not transform the whole
18 communication into a solicitation”). While the Plaintiff argues that the text messages offering
19 substitutions “offer goods and services,” he fails to consider that customers select their
20 substitution preferences at the time the order is placed (either the customer preselects
21 substitutions, selects no substitutions, or asks Walmart to select them). Dkt. 76-1 at 4-5.

22 Further, Walmart sent text messages when I.M. canceled her order: “As requested, we’ve
23 canceled your Walmart or-der. . .” Dkt. 12 at 19.

Nothing in the content of these messages could reasonably be construed as an encouragement to the Plaintiff to purchase goods. They serve to merely inform I.M. that the order she placed was ready for pick up, was out for delivery/has been delivered, certain items were unavailable, substitutes for unavailable items were possible (she could adjust how substitutions were handled on her account), or the order was canceled. While the Plaintiff contends that because Walmart is a for-profit entity and all actions it takes are at least tangentially driven by its profit motive (including any text messages it sends)(Dkts. 72 and 77), informational text messages, for example, merely confirming commercial transactions which have been made, are not “telephone solicitations” violative of the TCPA. *See An Phan* at 1262; *Moskowitz v. Am. Sav. Bank, F.S.B.*, 2020 WL 61576, at *3 (D. Haw. Jan. 6, 2020), *aff’d*, 37 F.4th 538 (9th Cir. 2022).

2. Context of Messages Demonstrates Texts were not Solicitations

Applying a “measure of common sense” here, the Plaintiff has also failed to show that the context in which the text messages were sent could reasonably be construed as an encouragement to purchase goods or services from Walmart. The messages were sent after I.M. placed the orders and related to ongoing business transactions. After the order was filled or canceled no additional messages were sent about the order. New messages were only sent if I.M. placed a new order. There is no evidence that they were sent to entice the Plaintiff to purchase anything.

The Plaintiff points to an out of circuit case, *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, 80 F.4th 466 (4th Cir. 2023), and argues that the context of the texts here – messages from for-profit entities, means that their communications were commercial in nature. Dkt. 77. The Plaintiff again asserts that as a for profit entity, everything Walmart does is for profit. *Id.* *Carlton* is distinguishable.

1 In *Carlton*, the defendant sent an unsolicited fax to the plaintiff chiropractic clinic, offering a
2 free digital book containing information about prescription drugs. 80 F.4th at 470. Drug
3 companies paid the defendant to include their products in the eBook. *Id.* The fax included a
4 pitch about the “virtues and quality” of the eBook. *Id.* The *Carlton* court found that the fax
5 constituted an “unsolicited advertisement” because the fax was “commercial in nature,” even
6 though the eBooks were offered for free. *Id.* at 472-474. The court explained that its conclusion
7 flowed “from the everyday understanding of the term ‘advertise.’ ‘Advertise’ customarily has a
8 distinctly commercial flavor, invoking a business solicitation, designed to attract clients or
9 customers and in the hopes to make a profit, directly or indirectly.” *Id.* at 472-73.

10 Unlike in *Carlton*, the text messages sent here were about orders which had already been
11 made – they were about ongoing or completed transactions. The text messages here did not
12 include a “pitch” to purchase goods. The faxes in *Carlton* were sent with the hope that future
13 transactions (the prescription and purchase of drugs listed in the eBook) would occur. The text
14 messages here were merely about already-made order fulfillment and not about possible future
15 purchases. Further, *Carlton* addresses the TCPA’s provision on “advertisement,” which is
16 defined separately under the regulation as “any material advertising the commercial availability
17 or quality of any property, goods, or services” at § 64.1200(f)(1). This definition is broader
18 than the definition of “telephone solicitation” found at § 64.1200(f)(15). *Carlton* is inapplicable.

19 The Plaintiff argues that the timing of when Walmart charges the customer (at the time of the
20 order if purchased with a gift card or electronic benefits transfer card or at the time of
21 pickup/delivery if purchased by debt card or credit card) makes at least some of these purchases
22 “future purchases.” Dkt. 72. This argument is without merit. In this case, text messages were
23 sent when I.M. completed her order, when funds were transferred is immaterial.

1 The Plaintiff's contention, that any unsolicited communication from a for-profit entity has a
2 "commercial nexus" and so is a "telephone solicitation," would improperly broaden the scope of
3 the TCPA's definition of "telephone solicitation." Walmart's general goal to make a profit is
4 "simply too attenuated" to give rise to the implication that its purpose in sending the text
5 messages about I.M.'s orders was to coax the Plaintiff into making future purchases. *See Smith*
6 *v. Blue Shield of California Life & Health Ins. Co.*, 228 F. Supp. 3d 1056, 1067 (C.D. Cal. 2017).
7 "Were this Court to hold otherwise, it would transform practically all communication from any
8 entity that is financially motivated and exchanges goods or services for money" into "telephone
9 solicitation," which "would contravene the delineated definitions of that term" in 47 C.F.R. §
10 64.1200(f)(15). *Id.* at 1068.

11 The Plaintiff maintains that the cases Walmart cites don't apply because the parties in those
12 cases consented to be contacted (either called or texted). Dkt. 77. He points out that I.M. could
13 not consent for him to be called. *Id.*

14 Walmart properly notes that whether the Plaintiff consented to the text messages is
15 immaterial to whether the text messages met the TCPA's statutory requirement that the text
16 messages constituted "telephone solicitation" - that they were sent for "the purpose of
17 encouraging the purchase . . . of . . . goods, or services" 47 U.S.C. § 227(a)(4); 47 C.F.R. §
18 64.1200(f)(15). Consent to receive the text messages is a separate defense, *See* 47 U.S.C. §
19 227(a)(4)(A), and Walmart does not assert it here.

20 The Plaintiff contends that he sent Walmart a "STOP" request and it continued to send him
21 text messages. Dkt. 77. He argues that the text messages did not specify that the "STOP"
22 request was merely about the single order. *Id.* The Plaintiff then makes a poor attempt at
23 analogizing his texting a four-letter response of "STOP" to a retailer sending him messages about
24

1 someone else's order with the sexual assault of a woman. *Id.* This comparison is wildly
2 inappropriate, wholly unprofessional, and entirely off the mark.

3 Further, Plaintiff's contention that Walmart did not specify that the "STOP" request related
4 to a single order is belied by the record. After the Plaintiff texted "STOP," Walmart's response
5 provides that they will "no longer receive m[essages] about [their] order." Dkt. 76-1 at 3. In
6 context, these text messages are not reasonably construed to "STOP" all messages or to be
7 encouragement to purchase goods or services ("telephone solicitations").

8 The Plaintiff argues that Walmart designed their order webpage so that customers would not
9 see the portion with the pre-marked checked box indicating that they wanted text updates about
10 orders and the phone number the customer listed. Dkt. 77. He fails to support this contention
11 with evidence, and it is pure supposition on his part. In any event, it is irrelevant to whether the
12 context of the order updating text messages were "telephone solicitations" or not.

13 3. Conclusion on Plaintiff's TCPA claim

14 Applying the required "measure of common sense" here, the Plaintiff fails to point to
15 issues of fact that either the content or context of the text messages was to "encourag[e] the
16 purchase . . . of . . . goods or services." Accordingly, he did not produce evidence that the text
17 messages were "telephone solicitations," which is a required element for his TCPA claim. His
18 motion for summary judgment on his TCPA claim (Dkt. 72) should be denied and Walmart's
19 motion (Dkt. 75) granted. The Court need not reach the other grounds advanced by Walmart as
20 to why the Plaintiff's motion for summary judgment on his TCPA claim should be denied (i.e.
21 whether the phone number at issue was "residential" as required by the TCPA or whether the
22 Plaintiff had an ongoing business relationship with Walmart (an affirmative defense under the
23 TCPA)). The Plaintiff's TCPA claim should be dismissed.

1 **D. STATE LAW: CEMA CLAIM**

2 The Plaintiff asserts a claim under CEMA, citing RCW 19.190.060 (Dkt. 12) in his Amended
3 Complaint and contends in his response to Walmart’s motion for summary judgment that he is
4 asserting a CEMA claim under RCW 19.190 “generally” (Dkt. 77). Even construing the
5 Plaintiff’s claim liberally, his CEMA claim should be dismissed.

6 Walmart points out that there is no private cause of action under CEMA citing *Wright v. Lyft,*
7 *Inc.*, 189 Wn.2d 718, 723-726 (2017). Dkt. 75. That is not the end of the inquiry. Instead,
8 CEMA provides that a violation of its provisions are “unfair or deceptive act[s] in trade or
9 commerce and an unfair method of competition for the purpose of applying the Consumer
10 Protection Act.” RCW 19.190.060(2). The Washington Supreme Court has held that a violation
11 of RCW 19.190.060 constitutes a per se violation of Washington’s Consumer Protection Act,
12 RCW 19.86.090. *Wright* at 728-732. Accordingly, the Plaintiff’s CEMA claim should be
13 analyzed by examining the statutory language. *Id.*

14 Pursuant to CEMA’s RCW 19.190.060(1), “[n]o person conducting business in the state may
15 initiate . . . an electronic commercial text message” to a Washington resident’s cellular
16 telephone. As is relevant here, an electronic commercial text message is defined as “an
17 electronic text message sent to promote . . . goods, or services for sale” RCW
18 19.190.010(3).

19 The Plaintiff has not carried his burden on summary judgment to show that there are issues of
20 fact as to his CEMA claim. The Plaintiff has failed to point to any evidence that the text
21 messages sent here were “commercial text messages” – that they were “sent to promote . . .
22 goods, or services for sale” RCW 19.190.010(3). As stated above in the TCPA claim
23 analysis, the messages were informational updates regarding orders. There is no mention of any
24

particular product or service; they merely contain the logistics of order purchases. Reasonably construed, the text messages in no way promoted future sales. Accordingly, there are no issues of fact; Walmart is entitled to judgment as a matter of law on the Plaintiff's CEMA claim. The Plaintiff's motion for summary judgment on his CEMA claim (Dkt. 72) should be denied, Walmart's motion on the claim (Dkt. 75) granted, and the CEMA claim should be dismissed.

III. ORDER

It is **ORDERED** that:

- Walmart's Motion to Strike (Dkt. 82) **IS GRANTED, IN PART, and STRICKEN AS MOOT, IN PART,**
- Walmart's Motion to Strike (Dkt. 87) **IS STRICKEN AS MOOT,**
- Plaintiff's Motion to Strike (Dkt. 77) **IS DENIED,**
- Plaintiff's Motion to Strike (Dkt. 84) **IS STRICKEN AS MOOT,**
- Plaintiff's Motion to Strike (Dkt. 89) **IS STRICKEN AS MOOT,**
- Walmart's Motion for Summary Judgment (Dkt. 75) **IS GRANTED,**
- Plaintiff's Motion for Summary Judgment (Dkt. 72) **IS DENIED,** and
- This case **IS DISMISSED.**

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 9th day of April, 2024.



ROBERT J. BRYAN
United States District Judge